EDITOR'S NOTE

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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. _____

VICTOR TATE, Petitioner,

v.

FISCHER STEEL CORPORATION, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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July 25, 1986

QUESTIONS PRESENTED

1. In an action seeking to vacate an arbitration award, does the opinion and award of the arbitrator constitute a conclusive and binding record, for purposes of judicial review, when no recording or transcript of the evidence exists? and

2. In an action seeking to vacate an arbitration award, may post hearing affidavits of observers at the hearing be considered as establishing a record of the evidence presented at the hearing, for purpose of judicial review, when no recording or transcript of the evidence exists?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. _____

VICTOR TATE, Petitioner,

v.

FISCHER STEEL CORPORATION, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The petitioner Victor Tate respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit filed on April 29, 1986 and issued as mandate on May 21, 1986.

OPINION BELOW

The opinion of the Court of Appeals, which was not recommended for full text publication appears in the Appendix hereto. The decision of the U. S. District Court for the Western District of Tennessee, is attached hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was filed on April 29, 1986 and issued as a mandate on May 21, 1986 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. In an action seeking to vacate an arbitration award, does the opinion and award of the arbitrator constitute a conclusive and binding record, for

purposes of judicial review, when no recording or transcript of the evidence exists? and

2. In an action seeking to vacate an arbitration award, may post hearing affidavits of observers at the hearing be considered as establishing a record of the evidence presented at the hearing, for purpose of judicial review, when no recording or transcript of the evidence exists?

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE, TITLE 9:

Section 10: Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrator exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

UNITED STATES CODE, TITLE 9:

Section 11: Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration -

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

STATEMENT OF THE CASE

On June 14, 1983, petitioner employed by respondent as a Helper, filed a grievance with respondent company, alleging that the respondent was violating the collective bargaining agreement by putting higher classified workers with less seniority than petitioner to work in the Helper classification while petitioner continued to be on layoff. The issue

before the arbitrator was stated as follows:

> Did the Company violate the Agreement by working less senior employees from higher job classifications, in the Helper classification instead of working the Grievant? If so, what shall be the remedy. [Opinion and Award letter dated October 6, 1983, at Appendix 3, page 1]

On October 6, 1983, the arbitrator issued the following award:

> Award After careful consideration of all oral and written argument and evidence and for the reasons set forth above, it is awarded that:
>
> The Company did violate the Agreement by working less senior employees from higher job classifications in the helper classification. The Grievant is not the logical recipient of any remuneration. Other Helpers who were on layoff were more senior than he was. His grievance is, therefore, denied. The Company is directed to adhere to the language of the Agreement to fill future needs of this type and eliminate the reliance on an alleged past practice. It is not a past practice. [See Opinion

and Award Letter of October 6, 1983 at Appendix 3, Page 4.]

In addressing the practice of the respondent's use of higher classified workers to do the work of lower classifications, the arbitrator cited Section 9(H) of the collective bargaining agreement:

> In no case will the temporary transfer of a man from a higher to a lower rated job cause workers in the lower job with more seniority to lose work, or be moved from his regular job. [Collective Bargaining Agreement, Section 9(H)] [Opinion and Award Letter of October 6, 1983 at Appendix 3, page 4]

The arbitrator then stated that:

> The Grievant did lose work, partly as a result of this Action, and partly as the result of his own unavailability for work. Additionally, Company testimony at the hearing revealed that he would not have been the proper Helper to have been recalled to work, because there were three other Helpers who were

> more senior then he was, and the recall would properly have gone to the most senior, available one of them. [Opinion and Award Letter of October 6, 1983 at Appendix 3, page 4]

The petitioner and his union representatives attempted to have the respondent join with them to ask the arbitrator to reconsider his decision by reason of the fact that despite the language of the arbitrator's award, in point of fact, there was absolutely no evidence presented by the respondent to the effect that the petitioner was not the most senior helper. The respondent, while agreeing that Victor Tate was the most senior helper on layoff, refused to join with the petitioner and the union to request the arbitrator to explain or modify his decision.

On February 17, 1984, petitioner, relying upon Title 9, U.S.C. Sections 10 and 11 and Title 29 U.S.C Section 185 a, brought an action in the United States District Court seeking to vacate or to modify the arbitration award. In support of his application, petitioner submitted the affidavits of two individuals who were present and observed the entire arbitration hearing. These affidavits were submitted with the initial petition because no verbatim transcript or recording was made of the hearing. H. V. Swanson's affidavit stated that there was no evidence at the hearing contending that someone other than Victor Tate was the senior classified helper during the time in question. George Williamson's

affidavit stated that:

> ...there was no evidence at the hearing whatsoever which tended to show anyone other than Victor Tate to be the most senior laid-off employee in the helper classification. Neither did the company at any time during the grievance procedure or the arbitration hearing advocate such a position. [Affidavit attached hereto as Appendix 4, page 2.]

The respondent subsequently moved to dismiss the petitioner's application for an order vacating or modifying the arbitration award and for Summary Judgment. Respondent Company submitted no countervailing affidavits nor any documents nor any evidence at all concerning what was presented at the arbitration hearing.

The respondent, steadfastly, has maintained throughout this litigation that the opinion and award letter alone constitutes the "record" for purposes of

the statutory right of a party to judicial review.

The United States District Court granted Petitioner's Motion for Summary Judgment, considering the unopposed affidavits of Swanson and Williamson to be "the record" of the arbitration hearing for the purpose of ruling on the cross motions for Summary Judgment which were before the District Court. Applying well settled principles of law with regard to the deference to be extended to arbitration awards and the narrow scope of review, as well as the principles applicable to dealing with motions for summary judgment, Judge Gibbons stated that:

> On this record the Court must conclude that no evidence existed to support the arbitrator's finding that Plaintiff was not

> the most senior helper on lay off. Defendant has not filed any affidavits or other evidence specifying any evidence which was presented to the arbitrator to support his finding. Defendant may not rely on the decision of the arbitrator under review to create a genuine issue as to whether there was any evidence to support that decision. [Appendix 2, page 3.]

Respondent subsequently appealed the decision of the United States District Court to the Court of Appeals for the Sixth Circuit. The Court of Appeals held that the "opinion and award letter" of the arbitrator did constitute the "record" for the purpose of judicial review and that its recitation of the resolution of a factual dispute precluded the District Court from considering the affidavits of Swanson and Williamson. The Court of Appeals viewed these affidavits as impermissible attempts to impeach an

arbitrator's specific factual finding based on the record.

The Court of Appeals at the outset of its opinion stated that the hearing was neither recorded nor transcribed and no record of it exists. [Appellate Court Opinion at Appendix 1, page 2.]

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS DECIDED AN IMPORTANT BUT UNSETTLED QUESTION OF FEDERAL LAW IN A MANNER WHICH DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The U.S. Arbitration Act and the cases construing and applying it mandate a sober judicial regard for the arbitration process in American labor law and a very narrow scope of judicial review is applicable once the parties resort to

litigation. Steelworkers v. Enterprise Wheel & Car Corp.,. 363 U.S. 593, 4 L.Ed.2d 1424, 80 S.Ct. 1358 (1960); United Steelworkers of America v.Warrior & Gulf Navigation Co., 363 U.S. 574, 4 L.Ed 2nd 1409, 80 S.Ct. 1347 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 4 L.Ed.2nd 1403, 80 S.Ct. 1343 (1960); W.R. Grace & Co. v. Local 759, _____ U.S. ____, 76 L.Ed.2d 298, 103 S.Ct. 2177 (1983). The basis for this fundamental principle of labor law is that the parties have bargained for the arbitrator's judgment concerning the dispute and neither of them is entitled to undermine the bargain's benefit to the other by obtaining a de novo hearing in federal court after an adverse arbitrator's decision. Without undermining this principle in the least,

the Court of Appeals for the Eighth Circuit has stated:

> Judicial deference to arbitration, however, does not grant carte blanche approval to any decision that an arbitrator might make. United Elec. Radio and Mach. Workers of America, Local 1139 v. Litton Microwave Cooking Products, Litton Systems, Inc., 704 F.2d 393, 395 (8th Cir. 1983).

Applying the basic principle of deference to the Arbitrator's decision which mandates a narrow scope of review in such cases, courts have held that an award is properly vacated where there is no evidence to support a crucial factual finding upon which it is based. See, e.g., Storer Broadcasting v. American Federation of Television & Radio Artists, 600 F.2d 45 (6th Cir. 1979), cert. denied 454 U.S. 1099 (1981).

Given the deference to be accorded arbitration awards and the narrow scope of review to be utilized by the court in which an action to vacate or modify an award is filed, the burden upon the party seeking such a remedy must chiefly consist of establishing in the trial court that what happened at the arbitration hearing constituted one of the clearly recognized grounds for relief specified in the statute as amplified by the case law. Of course, in a case where there is a court reporter and a transcript of evidence, there is no difficulty in showing what happened at the hearing. In the more common arbitration case, however, there is no transcript. Thus, the case at bar raises the most basic questions concerning the integrity of the arbitration process in

American labor law, for it involves the practical necessity for a procedure permitting either party to an arbitration process to seek judicial review thereof, while preserving and furthering the settled policy toward arbitration in general. This requires a balancing of meaningful opportunity for judicial review with a general reluctance to disturb the arbitrator's decision.

The opinion below notes at its outset that:

> The hearing was neither recorded nor transcribed and no record of it exists. [Appellate Court Opinion at Appendix 1, page 7]

After reciting the historical background of the lawsuit, the court first concludes that:

> ...the existing record, which is the written opinion and award of the arbitrator, shows very

> clearly that there was a factual dispute whether Tate was the most senior laid-off helper... [Appellate Court Opinion at Appendix, page 7]

Finding that the District Court had before it a record which placed the case in the posture of a disputed factual finding such that courts must defer to the arbitrator's decision, the Court of Appeals then evaluated the propriety of Petitioner's affidavits; and found them, predictably, to be impermissible post-hearing attacks upon a disputed factual matter resolved by the arbitrator on evidence of record.

The award involved in this case, at page 3-4 under the heading Discussion, contains the findings of the arbitrator. A crucial issue at this arbitration hearing was the respondent's practice of placing workers from higher job classifications to work in the lower, Helper classification insofar as this

adversely affected the rights of the other workers in the Helper classification. Concerning this issue, the award quotes Section 9(H) of the collective bargaining agreement as follows:

> In no case will the temporary transfer of a man from a higher to a lower rated job cause workers in the lower job with more seniority to lose work, or be moved from his regular job. [Opinion and Award Letter of October 6, 1983, at Appendix 3, page 4]

Finding the respondent to have violated this provision of the contract, the arbitrator then concluded that:

> The Grievant (petitioner) did lose work, partly as a result of this action, and partly as a result of his own unavailability for work. (emphasis added) [Opinion and Award Letter, of October 6, 1983, at Appendix 3, page 4]

Obviously, it is not possible that petitioner could have lost work due to respondent's violation of the contract in its temporary transfer practices unless the petitioner was the most senior, laid-off worker in the Helper classification. Despite this, the arbitrator then goes on to state that:

> ...Company testimony at the hearing revealed that he (petitioner) would not have been the proper Helper to have been recalled to work, because there were three other Helpers who were more senior than he was... [Opinion and Award Letter, dated October 6, 1983, at Appendix 3, page 4]

The above is the only reference in the award, considered by the court below to be the "record," to evidence on the critical question of petitioner's seniority. The first of these quoted statements is of necessity in its context, a conclusion or finding. The second, which is the only time a word like

"testimony" is used, is more likely a reference to something the arbitrator heard, i.e., evidence. It is hopelessly in conflict, however, with the first finding which precedes it, which must also be based upon evidence if it is to stand.

It is clear that the award recites that Respondent contended that petitioner was not the most senior laid-off helper, while it is not clear that the award demonstrates an evidentiary basis for such a contention. For this reason and the fact that all parties knew petitioner to have been the most senior laid-off helper in June of 1983, petitioner submitted affidavits with his application for an order to vacate or modify the award. The District Court clearly considered them only to serve as the basis for a record which could then be reviewed in accordance

with the general principles stated at the outset of this argument.

In holding that the award IS the record after first concluding that no record exists, the Court of Appeals has decided an important, unsettled federal question regarding judicial review of the arbitration process. This question has been decided in a manner that departs from the accepted and usual course of judicial proceedings in that no arbitration award can be subjected to judicial review in the Sixth Circuit unless there be an officially reported and transcribed record. For if the formality thus presumably mandated be lacking, the respondent in such future cases must always prevail based upon the award itself. The irony of an award or decision, said by the Congress to be

subject to limited judicial review, avoiding judicial review based upon its own language will work a far reaching and fundamental change in American labor law.

No reported case has been found by petitioner which holds that a District Court must accept as an incontrovertible and conclusive record of an arbitration hearing the memorandum written by the arbitrator himself. By way of analogy, cases at law and equity are appealed throughout the state and federal court system in which an appellant seeks review of an order of a lower court. These orders typically recite that a hearing was had, evidence and argument heard, and a decision rendered. Has anyone yet successfully contended that such order constitutes the "record" for review before any appellate tribunal? To be more

precise, Rule 10 of Federal Rules of Appellate Procedure details the manner of preparing the record for appeal. In particular Section (c) of that rule is perfectly analogous to what was done in the case at bar on a limited basis.

The standards necessary to accord the degree of judicial deference toward arbitration awards required by the cases are well stated in Rios v. Reynolds Metals Co., 467 F.2d 54 (5th Cir. 1972). Chief among these factors is that the evidence at the hearing must be shown to have dealt adequately with all factual issues. Id. at 58. In the case at bar, petitioner provided a record in the only manner reasonably available to him short of calling witnesses to an evidentiary hearing. The decision of the Court of Appeals works such a change in judicial

review of awards in such cases as to require this Honorable Court to grant the instant petition.

II. The COURT OF APPEALS HAS DECIDED AN IMPORTANT, UNSETTLED FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT, THE SEVERAL CIRCUIT COURTS OF APPEALS, AND ITS OWN DECISIONS.

In addition to the above grounds for granting certiorari, petitioner submits that the decision below conflicts with the whole tenor of the law regarding judicial review in such cases including the decisions of this Honorable Court as well as other decisions of the Sixth Circuit.

No reported case has been found which deals with the precise issues raised by this petition. Two other decisions, however, in this the Sixth Circuit have

followed a procedure like that of Judge Gibbons in this case. Teamsters Local 957 v. R.W.F. Distributing, 574 F.Supp. 703 (S.D. Ohio, 1983); Exquisito Services, Inc. v. Restaurant Workers Local, 579 F.Supp. 873 (S.D. Ohio 1984). In each of these cases, affidavits were received and considered as the "record" for review. In Exquisito, no factual finding was challenged while in Teamsters Local, the challenged finding was not the basis of the decision. Each case, however, represents an appropriate balancing of the right of judicial review with a judicial reluctance to disturb such awards. The lower court has distinguished these cases with the novel observation that:

> ...the district court in neither case vacated the arbitrator's award.... [Appellate Court Opinion at Appendix 1, page 8]

By overlooking the fact that the judge in each of the above cases utilized affidavits as was done by the district court in the case at bar, the Court of Appeals has placed the law in a state of utter confusion. Does this mean that petitioner must cite a case with the applicable principle and a prevailing petitioner? Adding to this confusion is the case of National Post Office, Mailhandlers, Watchmen, Messengers and Group Leaders Div., Laborers Intern. Union of North America, AFL-CIO v. U.S. Postal Service, 751 F.2d 834 (6th Cir. 1985), where the court states:

> Because there was no verbatim record of the ... arbitration hearing, the District Court properly held a thorough evidentiary hearing on the Union's allegations. Id. at 840.

In the case above a full hearing was held at which various witnesses on each side testified as to such things as the demeanor of the arbitrator, the substance of proffered testimony and other allegations concerning error in the hearing.

In summary, the lower court has decided petitioner's case on a narrow basis of what can properly be considered the "record" for purposes of judicial review of an arbitration award. By disallowing affidavits in the context of the instant case, the court below has departed from the accepted and usual course of judicial proceedings insofar as they concern a record on appeal and its preparation. In doing so, the court has decided a question of federal law which is unsettled and important, given the policy

in support of the arbitration process. Additionally, the lower court has departed from the whole tenor of the decisions of this Honorable Court from the Steelworkers Trilogy forward, and those of the several Circuit Courts of Appeal. See United Elec. Radio and Mach. Workers of America, Local 1139 v. Litton Microwave Cooking Products, Litton Systems, Inc. 704 F.2d 393, (8th Cir. 1983); City of Parkersburg, W. Va. v. Turner Const. Co., 612 F.2d 155 (4th Cir. 1980); Brotherhood of R.R. Trainmen v. Central of Georgia Ry. Co., 415 F.2d 403 (5th Cir. 1969). There is no specific Circuit Court of Appeals decision addressing the issue precisely as it arises in the instant case. Rather, the cited decisions from the other circuits all stand firmly for the proposition that an arbitration award must be based upon

evidence. In order to give meaning to the judicial review granted by statute, the law must permit a petitioner to provide a record for the reviewing court in the manner done herein. In any event, this Honorable Court should exercise its discretionary jurisdiction to decide the issue, given its far reaching implications.

CONCLUSIONS

For all of the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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July 25, 1986

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. _____

VICTOR TATE, Petitioner,

v.

FISCHER STEEL CORPORATION, Respondent.

AFFIDAVIT OF SERVICE

STATE OF TENNESSEE
COUNTY OF TIPTON

I, DAVID S. STOCKTON, after being duly sworn do hereby state that I have mailed three copies of the foregoing petition to Mr. Joseph K. Willcox, 1700 One Commerce Square, Memphis, Tennessee, 38103, Attorney for Respondent, Fischer Steel Corporation on this 25th day of July, 1986. All parties to this case have been notified.

David S. Stockton

SWORN TO AND SUBSCRIBED before me, a notary public on this 25th day of July, 1986.

Linda M. Warren
Notary Public

My Commission Expires:

10-8-89

APPENDIX

(Opinion and Judgment of Court of Appeals).....App. 1

(Opinion and Judgment of the United States District Court).....App. 2

(Opinion and Award Letter).....App. 3

(Affidavits Submitted to U. S. District Court by Petitioner).....App. 4

NO. 84-5971

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

VICTOR TATE,

Petitioner-Appellee,

V.

FISCHER STEEL CORPORATION,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FROM THE WESTERN DISTRICT OF TENNESSEE

Before, RYAN, Circuit Judge, and CELEBREZZE, and BROWN, Senior Circuit Judges

PER CURIAM. Appellant Fischer Steel Corporation (Fischer) appeals from the district court's order vacating an arbitrator's decision in its favor. Fischer contends that the district court improperly reviewed the arbitrator's factual finding that Appellee Victor Tate (Tate) was not the most senior employee in

his job classification (helper) on layoff status.

The facts that precipitated the filing of the grievance, as stated by the arbitrator and not contested by the parties, are as follows:

> The Grievant was employed by the Company on July 2, 1979. In February 1980 he was seriously injured on the job and was off work for a period of fifteen months. In April 1982, he was reinstated as a Beam Line Operator until July 9, 1982, when he was laid off. He was offered the opportunity to be recalled a month later, but he asked to be passed over due to his being under a doctor's care. In May 1983 he asked to be recalled - he was not, and it was then that he questioned the fact that other employees, who were classified at higher levels, were doing the work which he felt he should be doing because he had more seniority than any of those who were doing the work.

On June 14, 1983, petitioner filed

the following grievance with Fischer:

> Company working employees with less seniority on helpers jobs, while Grievant is laid off.
>
> The settlement requested is: Be called to work and paid for lost time.

A hearing was held before the arbitrator on September 27, 1983. The hearing was neither recorded nor transcribed and no record of it exists.

On October 6, 1983, the arbitrator issued his decision. The opinion states that, at the hearing, "oral and written argument and evidence were heard and received." In summarizing the contentions of the parties, the arbitrator stated that the union contended that "[t]he Grievant was the most senior employee on layoff," and that the company contended that he was not the most senior helper on layoff. On the seniority issue, the arbitrator found:

> [] Company testimony at the hearing revealed that [Tate] would not have been the proper Helper to have been recalled to work, because there were three other Helpers who were more senior than he was, and the recall would properly have gone to the most senior, available one of them.

Although concluding that Fischer had violated the contract, the arbitrator denied the grievance. His award states:

> The Company did violate the Agreement by working less senior employees from higher job classifications in the Helper classification. The Grievant is not the logical recipient of any remuneration. Other Helpers who were on layoff were more senior than he was. His grievance is, therefore, denied. The Company is directed to adhere to the language of the Agreement to fill future needs of this type and eliminate the reliance on an alleged past practice. It is not a past practice.

On February 17, 1984, Tate filed an application in the district court for an order vacating or modifying the arbitrator's award, contending that there

was no evidence to support the arbitrator's finding that Tate was not the most senior helper on layoff. In support thereof, Tate submitted the affidavits of the staff representative and the president of the AFL-CIO-CLC local representing Tate. Both affiants stated that they were present at the arbitration hearing in this case, and that there was no evidence presented at the hearing showing that anyone other than Tate was the most senior laid-off employee in the helper classification. Additionally, the staff representative's affidavit stated that both Tate's testimony and documentary evidence presented at the hearing showed that Tate was the most senior laid-off helper.

Fischer moved to dismiss the application, or, in the alternative, to have summary judgment granted in its favor. Fischer filed no countervailing affidavits; rather, it contended that the arbitrator's factual finding on the seniority issue was final and dispositive. On May 4, 1984, Tate filed a motion for summary judgment, relying on the previously filed affidavit.

On August 20, 1984, the district court granted summary judgment for Tate. Stating that the issue before it was "whether there was any evidence presented to the arbitrator to support his finding that plaintiff was not the most senior helper on lay-off at the relevant time," the court stated:

> Apparently no record of the hearing before the arbitrator

> exists. Plaintiff has filed two affidavits of individuals present at the hearing. Those affidavits assert that Tate was the most senior employee on layoff, that the arbitrator heard evidence to the contrary. Defendant filed no countervailing affidavits. Instead defendant relies on the arbitrator's decision itself and essentially argues that if the arbitrator says that testimony before him showed that plaintiff was not the most senior helper on lay-off, then the court should infer that the arbitrator in fact did hear evidence to support such a finding.

Citing Detroit Coil Co. v. International Ass'n of Machinists & Aerospace Workers, 594 F.2d 575, 580-581 (6th Cir. 1979), cert. denied, 444 U.S. 840 (1979), the district court stated that "the court may set aside an arbitration award which lacks any evidentiary support." The court then stated:

> On this record the court must conclude that no evidence existed to support the arbitrator's finding that plaintiff was not the most senior

> helper on lay-off. Defendant has not filed any affidavits or other evidence specifying any evidence which was presented to the arbitrator to support his finding. Defendant may not rely on the decision of the arbitrator under review to create a genuine issue as to whether there was any evidence to support that decision.

The district court vacated the arbitrator's award, and remanded the matter to the arbitrator for further proceedings and consideration of the appropriate remedy. Fischer's motion to reconsider was denied, and this appeal followed.

I.

It has long been the law that labor arbitrators' decisions interpreting collective bargaining agreements are subject to very limited judicial review. "Under the principles enunciated by the

Supreme Court in the Steelworkers trilogy [United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960)] arbitration is favored by means of resolving labor disputes." Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18, Int'l Typographical Union, 471 F.2d 872, 875 (6th Cir. 1972), cert. denied 411 U.S. 967 (1973). A decision of an arbitrator on the merits of a grievance "is within the peculiar province of the arbitrator and is to be enforced, regardless of whether [the court] might have interpreted the provisions differently, as long as the decision 'draws its essence' from the

collective bargaining agreement." United Steelworkers of America v. Timkin Co., 363 U.S. at 597. Moreover, it is the arbitrator's function, not the court's, to decide issues of fact which go to the merits of a dispute. Detroit News Publishers Ass'n, 471 F.2d at 875; American Radiator & Standard Sanitary Corp. v. Local 7 of the Int'l Brotherhood of Operative Potters, AFL-CIO, 358 F.2d 455, 458 (6th Cir. 1966).

This Court has held, however, that, "'if an examination of the record before the arbitrator reveals no support whatever for his determinations, his award must be vacated.'" Storer Broadcasting v. American Federal of Television & Radio Artists, 600 F.2d 45, 47 (6th Cir. 1979), cert. denied 454 U.S. 1099 (1981), quoting Detroit Coil Co. v. Int'l Ass'n of

Machinists, 594 F.2d 575, 580-81 (6th Cir. 1979), citing NF&M Corp. v. United Steelworkers of America, 525 F.2d 756, 760 (3d Cir. 1975).

Storer Broadcasting and Detroit Coil are distinquishable from the case before us. In Storer Broadcasting, the record before the arbitrator revealed "no testimony or documentary evidence" to support the arbitrator's factual finding, and the arbitrator himself, faced with a request from the district court, could not cite any factual support for his finding, and the arbitrator himself, faced with a request from the district court, could not cite any factual support for his findings. 600 F.2d at 48. Instead, the arbitrator's basis for his finding was that it was "more logical." This Court found it apparent that the arbitrator had

"'dispense[d] his own brand of industrial justice,'" quoting Enterprise Wheel & Car Corp., 363 U.S. at 597, rather than basing his award on evidence in the record. In Detroit Coil, we held that the arbitrator had rejected the application of a clear and unambiguous provision of the collective bargaining agreement and that "the record contained no evidence indicating a departure by the parties from the clear intendment of that language." 594 F.2d at 581. Therefore, we concluded that the award did not "draw its essence" from the agreement. Id.

In this case, the existing record, which is the written opinion and award of the arbitrator, shows very clearly that there was a factual dispute whether Tate was the most senior laid-off helper; that company testimony was heard to the effect

that he was not; and that such testimony was heard to the effect that he was not; and that such testimony was the basis for the arbitrator's finding that Tate was not the most senior laid-off employee in his job classification. Unlike Storer Broadcasting and Detroit Coil, the arbitrator in this case did not "dispense his own brand of industrial justice," but rather resolved a disputed issue of fact, stating, on the record, the evidentiary basis for his decision.

II.

The submission, in the district court, of affidavits of persons present at the hearing who did not testify before the arbitrator amounted to an attempt to impeach the arbitrator's factual finding with new evidence. Labor arbitrators'

awards may not be vacated on the basis of new evidence. Bridgeport Rolling Mills Co. v. Brown, 314 F.2d 885 (2nd Cir. 1963), cert. denied 375 U.S. 821 (1963). Since the arbitrator made a specific finding, on the record, that Tate was not the most senior laid-off helper, it is impermissible to attack this factual finding of the arbitrator with post-arbitration affidavits.[1]

Tate contends that the submission of such post-arbitration affidavits was allowed in two cases from the Southern District of Ohio. Exquisito Serivices, Inc. v. Restaurant Workers Local, 579 F.

---

[1] We note that these affidavits also contained "ultimate facts and conclusions of law" which the district court should have disregarded. See A.L. Pickens Co. v. Youngstown Sheet & Tube Co., 650 F.2d 118, 121 (6th Cir. 1981).

Supp. 873 (S.D. Ohio 1984), aff'd without op. 754 F.2d 373 (6th Cir. 1984); Teamsters Local 957 v. R.W.F. Distributing Co., 574 F. Supp. 703 (S.D. Ohio 1983). We note, however, that the district court in neither case vacated the arbitrator's award under Storer and Detroit Coil. In Exquisito Services, no factual finding was challenged. 579 F. Supp. at 876. In Teamsters Local 957, the court held that, although the arbitrator apparently made factual errors, it was not clear that his fandings had "no support whatever" in the record before him. 574 F.Supp. at 707. Moreover, the court held that the challenged factual findings were not the basis of the arbitrator's decision. Id.

Contrary to the district court's opinion, Fischer was not required, in

these circumstances, to file countervailing affidavits. In light of the specific factual finding of the arbitrator, which is contained in the record, it would have been improper for the district court to weigh anew the matters presented in affidavits and opposing affidavits, de hors the record. Neither Detroit Coil nor Storer Broadcasting require the district court to reconsider evidence on a disputed issue of fact specifically decided by the arbitrator on the basis of testimony presented at the arbitration hearing.

Accordingly, the decision of the district court is reversed and the case remanded with directions to reinstate the arbitrator's award.

ISSUED AS MANDATE: 5/21/86

COST: none

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN THE MATTER OF THE ARBITRATION BETWEEN:	*	
VICTOR TATE,	*	
Petitioner,	*	
AND	*	NO. 84-2124-GB
FISCHER STEEL CORPORATION,	*	
Respondent.	*	

ORDER GRANTING SUMMARY JUDGMENT
TO PLAINTIFF

Before the court are the parties' cross-motions for summary judgment. On the record the court grants summary judgment for plaintiff.

The issue before the court is whether there was any evidence presented to the arbitrator to support his finding that plaintiff was not the most senior helper

on lay-off at the relevant time and that as a result plaintiff was not entitled to a remedy for defendant's violation of the collective bargaining agreement.

Apparently no record of the hearing before the arbitrator exists. Plaintiff has filed two affidavits of individuals present at the hearing. Those affidavits assert that Tate was the most senior employee on layoff, that the arbitrator heard evidence to that effect and that there was no evidence to the contrary. Defendant filed no countervailing affidavits. Instead defendant relies on the arbitrator's decision itself and essentially argues that if the arbitrator says that testimony before him showed that plaintiff was not the most senior helper on lay-off, then the court should infer

that the arbitrator in fact did hear evidence to support such a finding.

It is well settled that where an arbitrator's decision involves contractual interpretation, the court must defer to any decision which draws its essence from the agreement. W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America, ____ U.S. ____, 103 S.Ct. 2177, 2182 (1983); United Steelworkers v. Enterprises Wheel & Car Corp. 363, U.S. 593, 597 (1960).

Facts going to the merits of a dispute under a collective bargaining agreement are to be found by the arbitrator, not the court. Detroit Newspaper Publishers Association v. Detroit Typographical Union No. 18,

International Typographical Union, 471 F.2d 872, 875 (6th Cir. 1972), cert. denied, 411 U.S. 967 (1973); American Radiator & Standard Sanitary Corp. v. Local 7 of the International Brotherhood of Operative Potters, AFL-CIO, 358 F.2d 455, 458 (6th Cir. 1966); Piertro Scalzitti Co. v. International Union of Operating Engineers, Local No. 150, 351 F.2d 576, 580 (7th Cir. 1965); see United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); American Federation of Television and Radio Artists, Cleveland Local, AFL-CIO v. Storer Broadcasting Co., 660 F.2d 151, 153 (6th Cir. 1981). A court should refuse to review the merits of an arbitration decision under a collective bargaining agreement. See Enterprise Wheel, 363 U.S. at 596. The court must defer to the

arbitrator's decision "notwithstanding the erroneousness of any factual findings or legal conclusions, absent a manifest disregard of the law." George Day Construction Co., Inc. v. United Brotherhood of Carpenters and Joiner of America, Local 354, 722 F.2d 1471, 1477 (9th Cir. 1984); see also American Postal Workers v. United States Postal Service, 682 F.2d 1280, 1284 (9th Cir. 1982), cert. denied, ____ U.S. _____, 103 S.Ct. 1183 (1983). However, the court may set aside an arbitration award which lacks any evidentiary support. See Detroit Coil Co. v. International Association of Machinists and Aerospace Workers, Lodge No. 82, 594 F.2d 575, 580-581 (6th Cir. 1979).

On this record the court must conclude that no evidence existed to support the arbitrator's finding that

plaintiff was not the most senior helper on lay-off. Defendant has not filed any affidavits or other evidence specifying any evidence which was presented to the arbitrator to support his finding. Defendant may not rely on the decision of the arbitrator under review to create a genuine issue as to whether there was any evidence to support that decision.

Certainly if any evidence that plaintiff was not the most senior helper on lay-off was presented to the arbitrator, then plaintiff would be attempting to reargue issues before the arbitrator and seeking judicial review of the merits. In that event summary judgment for defendant would be appropriate. This record, however, mandates a contrary result.

Plaintiff's motion for summary judgment is granted, defendant's motion is denied and the award of the arbitrator is vacated. This matter is remanded to the arbitrator for further proceedings and consideration of the appropriate remedy to be awarded plaintiff.

IT IS SO ORDERED.

/S/_____
JULIA SMITH GIBBONS
UNITED STATES DISTRICT JUDGE

DATE: August 20, 1984

IN THE MATTER OF ARBITRATION BETWEEN	)	
FISCHER STEEL Memphis, Tennessee	)	OPINION AND AWARD Grievance of Victor Tate
and	)	
UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, Local Union 4786	)	

Arbitrator: Mathew W. Jewett

Appearances: For the Company - Mr. John C. Adamson, Vice President; Eddie Sims, Foreman.

For the Union - Mr. George Williamson, Staff Representative; Victor L. Tate, Grievant; H.V. Swanson, President, Local 4786; Curtis W. Smith and Barry Smith, Witnesses.

Pursuant to Section 10 of their Agreement, the parties named above selected Mathew W. Jewett as arbitrator for the purpose of hearing and deciding a certain matter in dispute between them.

At a hearing held on September 27, 1983 it was decided that the question the said arbitrator shall answer is the following:

> Did the Company violate the Agreement by working less senior employees from higher job classifications, in the Helper classification, instead of working the Grievant? If so, what shall be the remedy?

The hearing was held on September 27, 1983, at the Ramada-Executive Plaza, Memphis, Tennessee at which time oral and written argument and evidence were heard and received. It was agreed by the parties that they would not file posthearing briefs.

The Issue

The Grievant in the instant case is Victor L. Tate. At the time of the occurrence of the events which led to a grievance being filed, he was employed as

a Helper, by Fischer Steel Corporation, Memphis, Tennessee (hereinafter referred to as the "Company"). He is represented in this proceeding by United Steelworkers of America, AFL-CIO-CLC (hereinafter referred to as the "Union").

The Grievant was employed by the Company on July 26, 1979. In February 1980 he was seriously injured on the job and was off from work for a period of fifteen months. In April 1982, he was reinstated as a Beam Line Operator until July 9, 1982, when he was laid off. He was offered the opportunity to be recalled a month later, but he asked to be passed over due to his being under a doctor's care. In May 1983 he asked to be recalled - he was not, and it was then that he questioned the fact that other employees, who were classified at higher levels, were

doing the work which he felt he should be doing because he had more seniority than any of those who were doing the work.

On June 14, 1983, he filed the following grievance with the Company:

> Company working employees with less seniority on helpers jobs, while Grievant is laid off.
>
> The settlement requested is: Be called to work and paid for all lost time.

The grievance has been processed without settlement through all procedural steps contractually provided and no question has been raised concerning its procedural regularity. It is, therefore, properly before the arbitrator in this proceeding.

Positions of the Parties

The Contentions of the Union

The central contentions of the Union may be summarized as follows:

1. The Grievant was the most senior employee on layoff. Later on, two less-senior employees, who were in a higher job classification than that of the Grievant were recalled and used in his job.

2. The Union recognizes that the Company was battling for its survival during the period in question. However, the work by these other employees went on for a period of two weeks.

3. The Union is not arguing against recalling employees in different classifications, and it recognizes that the Company could use other employees to do tacking and welding rather than lay them off too.

The Contentions of the Company

The chief contentions of the Company are these:

1. The Agreement is not clear on the issue at hand. The Company did what it had done for the past twelve years when it used the higher rated men to do the work which the Grievant ordinarily did.

2. In the past, other, higher classified workers did the work in question unless the Helper could be used full-time.

3. The Grievant was not the most senior Helper who was on layoff. The other Helpers were on layoff when he was; each had more seniority than the Grievant did.

Discussion

Certain facts which were revealed at the hearing attested to the willingness of both parties to present a reasonable approach to this case. The Union stated that it knew the Company was going through

a very difficult period in the market place, due to a depressed demand for steel, and it agreed that there had been a practice of using higher classified employees and reducing them to lower classifications, while they retained the higher rate of pay for the contractually provided period.

For its part, the Company stated that it had only followed the practice of twelve years by utilizing higher rated employees to do lower rated work. In the instant case, however, the Company denies that such employees did only Helper's work for the two-week period in question. Additionally, the Company admits that the language in the Agreement is not clear. Specifically, it is the language at Section 9, SENIORITY, Paragraph (H), which states:

> In order to maintain a smooth and uninterrupted work flow, temporary transfers (less than 8 hours) of employees to a lower job or other jobs in their classification may be necessary. The pay will not be cut and the junior man who is capable of performing the job and is working in that work will be transferred. A work area is defined as that area controlled by one supervisor and within one building. In no case will the temporary transfer of a man from a higher to a lower rated job cause workers in the lower job with more seniority to lose work, or be moved from his regular job.

As stated, this language refers to temporary transfers, and that is what the Company bases its action upon, that the senior rated employees were not doing the work of a Helper exclusively for the two week period in question.

The language of the Agreement is really quite clear, it is the practice of the past twelve years, to which the Company refers, that gets in the way. For example, there was a transfer: one or

more higher rated men went from their jobs which had become slack, and they were sent out into the yard to do Helper's work. This was during a period when the amount of work the Company had for them was reduced, and if they had not done the lower classification work they, too would have been laid off. To keep them working, the Company used them as indicated. In the process, however, it violated the next part of Section 9 (H):

> In no case will the temporary transfer of a man from a higher to a lower rated job cause workers in the lower job with more seniority to lose work, or be removed from his regular job.

The Grievant did lose work, partly as a result of this action, and partly as the result of his own unavailability for work. Additionally, Company testimony at the hearing revealed that he would not

have been the proper Helper to have been recalled to work, because there were three other Helpers who were more senior than he was, and the recall would properly have gone to the most senior, available one of them.

The Company did not keep records of the amount of time spent in the lower classification by the higher rated men. Records were only kept by the supervisor immediately before the grievance was filed. It is not possible, therefore, to determine accurately how much time each day these men spent doing that work.

From the Company's point of view, the utilization of the higher rated men on Helper's work was part of the right given to it under the Management Rights provisions in the Agreement which states: "...the direction of the working force,...

to transfer employees from job to job, and the right to relieve employees from duty because of lack of work,..." This right is restricted, as in the instant case, by the language in Section 9 (H).

It is clear that the Company acted in good faith and with the conditions of serious economic factors confronting it when it used the higher rated men as indicated in this case. Even the Union spokesman attested to this. In the face of clear and ambiguous words, however, the reference to a past method of doing certain things cannot stand. In the instant case there was work for a Helper to have done - if not the Grievant, then, the most senior one on layoff.

Award

After careful consideration of all oral and written argument and evidence, and for the reasons set forth above, it is awarded that

> The Company did violate the Agreement by working less senior employees from higher job classifications in the Helper classification. The Grievant is not the logical recipient of any remuneration. Other Helpers who were on layoff were more senior then he was. His grievance, is therefore, denied. The Company is directed to adhere to the language of the Agreement to fill future needs of this type and eliminate the reliance of an alleged past practice. It is not a past practice.

/S/_____
Mathew W. Jewett,
Arbitrator

Memphis, Tennessee
October 6, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN THE MATTER OF THE ARBITRATION BETWEEN:	*	
VICTOR TATE,	*	
Petitioner,	*	
AND	*	NO. 84-2124-GB
FISCHER STEEL CORPORATION,	*	
Respondent.	*	

AFFIDAVIT OF GEORGE WILLIAMSON

I, GEORGE WILLIAMSON, being first duly sworn, depose and say the following:

1. I am the Staff Representative for United Steelworkers of America, AFL-CIO-CLC, Local 4786.

2. I was a signatory to the current Collective Bargaining Agreement between the United Steelworkers, Local 4786 and

Fischer Steel Corporation executed on May 11, 1981 and I am familiar with its terms.

3. Pursuant to my duties, I attended an arbitration hearing conducted by Mr. Mathew Jewett on September 27, 1983, in Memphis, Tennessee to consider the grievance of Victor Tate. Also present were H.V. Swanson, John Adamson, and Eddie Sims.

4. At this hearing, testimony was taken from Curtis W. Smith, Barry Smith and Victor Tate. The testimony of Curtis W. Smith and Barry Smith was to the effect that they had been in a lay-off status about June of 1983, which they were recalled to work by Fischer Steel Corporation. Their job classifications at the time of this recall was respectively, tacker and welder. Each of these job classifications is higher than that of

Helper which was Victor Tate's classification. Subsequent to their recall both Curtis and Barry Smith were put to work in the Helper classification.

5. Additional testimony was taken from Victor Tate to the effect that he was the most senior employee in a lay-off status in the Helper classification in June of 1983. Documentary evidence was received which showed Victor Tate to be the most senior laid-off employee in the Helper classification at this time. A true and accurate copy of the seniority list is attached to and made a part of this Affidavit.

6. No electronic recording was made of the above described hearing held on September 27, 1983.

7. On reviewing the award of the arbitrator in the case of Victor Tate which was dated October 6, 1983, I was at a loss to determine how the arbitrator could find that Victor Tate was not the most senior employee in the Helper classification.

8. Accordingly, I initiated correspondence between myself and both the company and the arbitrator with a view toward correcting this error.

9. There was no evidence at the hearing whatsoever which tended to show anyone other than Victor Tate to be the most senior laid-off employee in the Helper classification. Neither did the company at any time during the grievance procedure or the arbitration hearing advocate such a position.

10. Mr. John Adamson, Vice President of Fischer Steel Corporation, stated in a:letter to me on November 18, 1983, that the company considered that the matter was closed due to the final award of the arbitrator.

/S/
GEORGE WILLIAMSON

SWORN TO AND SUBSCRIBED to before me this the 20th day of January, 1984.

/S/ Charlyne Noblin
Notary Public

My Commission Expires
July 22, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN THE MATTER OF THE ARBITRATION BETWEEN:	*	
VICTOR TATE,	*	
Petitioner,	*	
AND	*	NO. 84-2124-GB
FISCHER STEEL CORPORATION,	*	
Respondent.	*	

AFFIDAVIT OF H. V. SWANSON

I, H. V. SWANSON, being first duly sworn, depose and say the following:

1. I am the Local Union President of Local 4786, United Steelworkers of America, AFL-CIO-CLC.

2. I was a signatory to the current Collective Bargaining Agreement between the United Steelworkers, Local 4786 and

Fischer Steel Corporation executed on May 11, 1981 and I am familiar with its terms.

3. Pursuant to my duties, I attended an arbitration hearing conducted by Mr. Mathew Jewett on September 27, 1983, in Memphis, Tennessee to consider the grievance of Victor Tate. Also present were H.V. Swanson, John Adamson, and Eddie Sims.

4. I am familiar with each employee on the Seniority List and at the time in question Victor Tate was the senior classified helper on layoff. I will mark and initial the person Senior to Mr. Tate on the list attached hereto. I will also mark and initial all employees Layed Off at the time in questions. C.H. indicates Classified Helper; T. - Tacker; F - Fitter; M.O. - Machine Operator; etc.

5. There was no evidence at the hearing contending that someone other than Victor Tate was the Senior Classified Helper during the time in question.

/S/_____
H. V. SWANSON

SWORN TO AND SUBSCRIBED to before me this the 20th day of January, 1984.

/S/ Charlyne Noblin_____
Notary Public

My Commission Expires
July 22, 1987

Supreme Court, U.S.
FILED
AUG 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-192

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

VICTOR TATE,

Petitioner,

v.

FISCHER STEEL CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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GLANKLER, BROWN, GILLILAND,
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Attorneys for Respondent

QUESTIONS PRESENTED FOR REVIEW

1. In an action seeking to vacate an arbitration award, is an arbitrator's opinion and award that recites the evidence upon which the arbitrator's factual findings were based, a sufficient part of the record to preclude a district court from vacating the award based on new affidavits claiming that the arbitrator's factual findings were based on an inaccurate understanding of the evidence heard by the arbitrator?

2. In an action seeking to vacate an arbitration award, should post-hearing affidavits that set forth the recollection of persons who did not testify at the arbitration hearing of the proceedings and add their opinions on the ultimate issues before the arbitrator be relied upon to reject the arbitrator's

specific findings of fact based on testimony that the arbitration award recites that the arbitrator heard?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 86-192

Victor Tate,

Petitioner,

v.

Fischer Steel Corporation,[1/]

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case concerns the attempt of the Petitioner to overturn the specific factual findings made by an Arbitrator in

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1/ Respondent Fischer Steel Corporation is a wholly owned subsidiary of Fischer Lime and Cement Company. The only other company affiliated with Respondent is Fischer Lime and Cement Company (Arkansas).

a Labor Administration Award through the use of post-arbitration affidavits of persons present at the arbitration hearing but who did not testify before the arbitrator. The affidavits contested the factual conclusions drawn by the arbitrator and contradicted the statement in his Opinion and Award that, "Additionally, Company testimony at the hearing revealed that [Petitioner] would not have been the proper helper to have been recalled to work because there were three other helpers who were more senior than he was, and the recall would properly have gone to the most senior, available one of them." (Petitioner's Appendix 3, at 9-10).

Petitioner's grievance that led to the arbitration alleged that the Respondent Company had violated the

collective bargaining agreement by putting to work employees with less seniority than Petitioner while Petitioner continued to be on layoff. Pursuant to the collective bargaining agreement, the issue was submitted to arbitration. The collective bargaining agreement provides that arbitrator's awards are "final and binding".

The Arbitrator's Opinion and Award, dated October 6, 1983, not only stated that the Arbitrator had heard testimony that the Petitioner was not the most senior helper on layoff; it also stated as a "chief contention" of the Company the position that Petitioner was not the most senior helper on layoff as more senior helpers were also on layoff (Petitioner's Appendix 3, at 4-5).

On February 17, 1984, Petitioner brought an action in the United States District Court seeking to vacate or modify the arbitration award on the basis that while the opinion explicitly stated that the arbitrator had heard evidence that Petitioner was not the most senior helper on layoff, this conclusion was erroneous and there had been in fact no such evidence presented. Petitioner submitted two affidavits to this effect from two persons who did not testify at the arbitration hearing Respondent, relying on the language of the award and the finality of the Arbitrator's factual findings, filed no countervailing affidavits. On cross-motions for summary judgment, the District Court granted summary judgment to the Petitioner based on Petitioner's affidavits.

Respondent appealed to the Sixth Circuit Court of Appeals. The Court of Appeals reversed the District Court in an unpublished decision and reinstated the arbitration award. The Sixth Circuit, citing the decisions of this Court in the "Steelworkers Trilogy" for the well established principle that the scope of judicial review of arbitrator's award is very limited, determined:

> In this case, the existing record, which is the written opinion and award of the arbitrator, shows very clearly that there was a factual dispute whether Tate was the most senior laid-off helper; that company testimony was heard to the effect that he was not; and that such testimony was the basis for the arbitrator's finding that Tate was not the most senior laid-off employee in his job classification. Unlike Storer Broadcasting and Detroit Coil, the arbitrator in this case did not "dispense his own brand of industrial justice," but rather resolved a disputed issue of fact, stating, on the record,

> the evidentiary basis for his decision. (Petitioner's Appendix 1, at 12-13)

The Court further reasoned that the introduction of post-arbitration affidavits was an impermissible attempt to attack the arbitrator's factual findings with new evidence.

Petitioner subsequently filed with this Court a Petition for a Writ of Certiorari. Accordingly, Respondent files this Brief in Opposition to the Petition.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THE SIXTH CIRCUIT'S HOLDING IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE DECISIONS OF OTHER CIRCUITS.

Although the Petitioner admits that "[n]o reported case has been found which deals with the precise issues raised by this Petition," he asserts that "the Court of Appeals has decided an important, unsettled federal question in a way that conflicts with applicable decisions of this Court, the several circuit courts of appeals, and its own decisions." (Petitioner's Brief at 29). This is simply an inaccurate projection of the law. Petitioner's "conflicts" are at best illusory and the holding of the Sixth Circuit is in accord with the decisions of this Court and the other Circuit Courts of Appeals.

This Honorable Court, in the "United Steelworkers Trilogy", United Steelworkers of America v. American Manufacturing Company, 363 U.S. 564, 80

S.Ct. 1343 (1960); United Steelworkers of America v. Warrior and Gulf Navigation Company, 363 U.S. 574, 80 S.Ct. 1347 (1960); United Steelworkers of America v. Enterprise Wheel and Car Corporation, 363 U.S. 593, 80 S.Ct. 1358 (1960), set down guidelines for court review of arbitration decisions made under collective bargaining agreements. The three decisions mandated that arbitrator's opinions and awards are not to be vacated for mistakes of fact, nor are judges to substitute their judgment for that of the arbitrators. In its decisions, this Court held:

> Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator . . . . The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which

> will support the claim. 363 U.S. at 568. . . . The labor arbitrator performs functions which are not normal to the courts; the considerations which help them fashion judgments may indeed be foreign to the competence of courts. 363 U.S. at 581.
>
> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The Federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. 363 U.S. at 596.
>
> A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. 363 U.S. at 598.

The rules of law enunciated in the Steelworkers Trilogy have been

consistently followed by the courts, as evidenced by several recent Courts of Appeals decisions.

The Sixth Circuit, citing United Steelworkers of America v. Enterprise Wheel and Car Corporation, has held that when an arbitrator resolves a grievance on its merits through intepretation of substantive provisions of a collective bargaining agreement the decision is within the peculiar province of the arbitrator and is to be enforced, regardless of whether the court might have interpreted the agreement differently, as long as the arbitrator's decision draws its essence from the collective bargaining agreement. United Steelworkers of America v. Timkin Co., 717 F.2d 1008, 1009 (6th Cir. 1983).

Citing the Steelworkers Trilogy, the Fourth Circuit iterated the Supreme Court's holding that in order to preserve arbitration under collective bargaining agreements, courts must refuse to review the merits of an arbitration award. Clinchfield Coal Co. v. District 28 United Mineworkers, 720 F.2d 1365, 1368 (4th Cir. 1983). See also Piggly Wiggly, Etc. v. Piggly Wiggly, Etc., 611 F.2d 580, 583 (5th Cir. 1980) (federal policy of settling labor disputes by arbitration would be undermined if courts have the final say on the merits of arbitration awards by determining whether there is support for the arbitrator's decision); Virgin Islands Nursing Associations, Etc. v. Schneider, 668 F.2d 221, 223 (3rd Cir. 1981) (court cannot set aside arbitrator's award because it disagrees

with the arbitrator on the merits unless the award is in manifest disregard of the law). If an arbitration award, on its face, represents a plausible interpretation of the collective bargaining agreement, the courts must enforce the award, regardless of whether the decision is ambiguous and notwithstanding the erroneousness of any factual findings or legal conclusions. George Day Construction v. United Brotherhood of Carpenters, 722 F.2d 1471, 1477 (9th Cir. 1984).

It is a well settled rule of law that arbitration awards may not be vacated for mistakes of fact. American Postal Workers v. U.S Postal Service, 682 F.2d 1280, 1284 (9th Cir. 1982), cert. denied, 103 S.Ct. 1183 (1982); Shearson-Hayden Stone, Inc. v. Liang, 653

F.2d 310, 312 (7th Cir. 1981); Washington-Baltimore Newpaper Guild, Local 35 v. Washington Post Co., 442 F.2d 1234, 1239 (D.C. Cir. 1971); Saxis S.S. Co. v. Multifacs International Traders, Inc., 375 F.2d 577, 581-582 (2d Cir. 1967); Orion Shipping and Trading Company v. Eastern States Petroleum-Corporation of Panama, S.A., 312 F.2d 299, 300 (2nd Cir. 1963), cert. denied, 373 US 949 (1963); Teamsters Local 957 v. R.W.F. Distributing, 574 F.Supp. 703, 706-707 (S.D. Ohio 1983); Sidarma Societa Italiana, Etc. v. Holt Marine, 515 F.Supp 1302, 1308 (S.D. N.Y. 1981), aff'd, 681 F.2d 802 (2nd Cir. 1981).

In support of his position, the Petitioner cites two district court opinions, Teamsters Local 957 v. R.W.F. Distributing, 574 F.Supp. 703 (S.D. Ohio

1983) and Exquisito Services, Inc. v. Restaurant Workers Local, 579 F.Supp. 873 (S.D. Ohio 1974), as being in conflict with the decision below. (Petitioner's Brief, at 29, 30). However, Petitioner admits that these cases are factually distinguishable and that the Sixth Circuit so held in its opinion below. (Petitioner's Brief, at 30; Petitioner's Appendix 2 (Appellate Court Opinion) at 14, 15). Yet, even if there were a true conflict between these district court decisions and the Sixth Circuit's holding below, it would hardly create a proper issue for Supreme Court review. To the extent that a previous district court decision within the circuit may have been inconsistent with the opinion below, it is effectively overruled sub. nom., thus eliminating any conflict.

Petitioner also cites the Sixth Circuit decision in National Post Office v. U.S. Postal Service, 751 F.2d 834 (6th Cir. 1985), as being in conflict with the opinion below. That case, however, is also easily distinghished. In National Post Office an arbitration award was sought to be vacated on the basis of alleged improprieties of the arbitrator during the arbitration hearing. These alleged improprieties would not necessarily be reflected in the arbitration record and, as such, the court held that it was proper to hold a thorough evidentiary hearing into these allegations. 751 F.2d at 840. National Post Office in no way, however, condones the use of post-arbitration affidavits to introduce new testimony to contradict a factual finding explicitly made by an

arbitrator. National Post Office is simply consistent with settled law that there is a "strictly confined" doctrine which allows the judiciary to vacate an arbitration award "[w]here an arbitrator is guilty of misconduct .. or of any other behavior by which the rights of any party are prejudiced...." 9 U.S.C. § 10(c). Cf., United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 599 (1960).

In any event, Supreme Court Rule 17.1(a), which Petitioner apparently attempts to invoke by showing a conflict among the federal courts, generally contemplates a conflict between decisions of two or more circuits, not conflicting decisions within a circuit. 13 Moore's Federal Practice ¶ 817.21. If Petitioner desired to attack the Sixth Circuit's

decision based on prior decisions by that court, he should have attempted to resolve the issue by petitioning the Court of Appeal for a rehearing en banc rather than "invoking so exceptional a jurisdiction of this Court as that on certification." Wisniewski v. United States, 353 U.S. 901, 902 (1953).

Petitioner also cites three cases from other circuits, United Elec. Radio and Mach. Workers of America, Local 1139 v. Litton Microwave Cooking Products, Litton Systems, Inc., 704 F.2d 393 (8th Cir. 1983); City of Parkersburg W.Va. v. Turner Const. Co., 612 F.2d 155 (4th Cir. 1980); and Brotherhood of R.R. Trainmen v. Central of Georgia Ry. Co., 415 F.2d 403 (5th Cir. 1969), in support of his claim that the action of the Sixth Circuit "departs from the whole tenor of

the decisions of this Honorable Court from the Steelworkers Trilogy forward, and those of the several circuit courts of appeal." (Petitioner's Brief, at 33). A fair reading of these decisions, however, reveals an obvious effort of the Petitioner to create a "false" conflict where none exists. These decisions simply recognize the established principle that an arbitrator's decision must reflect that the arbitrator manifested fidelity to his obligations under the collective bargaining agreement. Where the arbitration award refers to certain testimony heard by the arbitrator as the basis for the decision, a Court should not suffer an attack on the decision by affidavits contesting whether the testimony was heard or was accurate. The parties to the arbitration have bargained

for the arbitrator's factual findings, not those of a court taking new evidence following the award. See United Steelworkers of America v. Enterprise Wheel and Car Corp., supra.

As can be readily seen, Petitioner cites no authority establishing a "true" conflict among the circuits. He again admits that "[t]here is no specific circuit court of appeals decision addressing the issue precisely as it arises in the instant case" (Petitioner's, Brief at 33), yet asks "[D]oes this mean that petitioner must cite a case with the applicable principle and prevailing petitioner?" (Petitioner's Brief, at 31). The answer to this question must be a resonant "yes," for otherwise he has failed to demonstrate a conflict warranting the invocation of the

Court's exceptional jurisdiction. Petitioner is simply trying to create a "false" conflict to avoid the settled rule that arbitration decisions are not ordinarily examined de novo nor may they be vacated on the basis of new evidence. Bridgeport Rolling Mills Co. v. Brown, 314 F.2d 885 (2nd Cir. 1963), cert. denied, 375 U.S. 821.

II. PETITIONER DOES NOT PRESENT AN IMPORTANT, UNSETTLED FEDERAL QUESTION.

Petitioner asserts that the Court of Appeals decided an important, unsettled federal question when it decided "that no arbitration award can be subjected to judicial review in the Sixth Circuit unless there has been an officially reported and transcribed record." (Petitioner's Brief, at 26). Petitioner

misreads the Court of Appeals' Opinion. Nowhere in the Court of Appeals' Opinion is such a holding found nor can such a holding be implied.

As noted earlier, in the Steelworkers Trilogy this Court established guidelines for judicial review of arbitration decisions made pursuant to collective bargaining agreements. United Steelworkers of America v. American Manufacturing Company, 363 U.S. 564, 80 S.Ct. 1343 (1960); United Steelworkers of America v. Warrior and Gulf Navigation Company, 363 U.S. 574, 80 S.Ct. 1347 (1960); United Steelworkers of America v. Enterprise Wheel and Car Corporation, 363 U.S. 593, 80 S.Ct., 1358 (1960). The Steelworkers Trilogy mandated that arbitrators' opinions and awards are not

to be vacated for mistakes of fact, nor is a judge to substitute his judgment for that of an arbitrator's. "The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards". United Steelworkers of America v. Enterprise Wheel and Car Corporation, 363 U.S. at 596. Accordingly, arbitration decisions on factual issues are conclusive and are not subject to review by district court judges who might interpret the evidence differently.

In Storer Broadcasting v. American Federation of Tel., et al, 600 F.2d 45, 47 (6th Cir. 1979) the Sixth Circuit Court of Appeals held that "if an examination of the record before the arbitrator revealed no support whatever for his determinations, his award must be

vacated". [emphasis supplied]. Storer Broadcasting does not alter the rule announced in the Steelworkers Trilogy. The Court of Appeals correctly distinguished its decision in Storer Broadcasting by observing that the arbitrator in Storer Broadcasting could not cite any factual support for his award. In the case at bar, however, the Court of Appeals found:

> The existing record, which is the written opinion and award of the arbitrator, shows very clearly that there was a factual dispute whether Tate was the most senior laid-off helper; that company testimony was heard to the affect that he was not; and that such testimony was heard to the effect that he was not; and that such testimony was the basis for the arbitrator's finding that Tate was not the most senior laid-off employee in his job classification. [emphasis supplied] Petitioner's Appendix 1, at 12-13.

Clearly the Arbitrator's Opinion and Award was itself a part of the "record" before the district court. And, in the case at bar, the Arbitrator's Opinion and Award recited the evidence, namely company testimony that Petitioner was not the most senior laid-off helper, which formed the basis for the Arbitrator's decision. Respondent was entitled to rely upon the Arbitrator's Opinion and Award as a part of the record supporting Respondent's Motion for Summary Judgment and countervailing Petitioner's Motion. The Opinion and Award rose to the level of a dispositive portion of the record because after the court examined the Opinion and Award and discovered there was evidence to support the Arbitrator's decision, there was no need for further examination of the record or affidavits.

"In light of the specific factual finding of the arbitrator, which is contained in the record, it would have been improper for the District Court to weigh anew the matters presented in affidavits..." (Petitioner's Appendix 1, at 16).

Since the record reveals evidence supporting the Arbitrator's decision on a factual issue it may not properly be overturned by a district court. The action of the Sixth Circuit herein is entirely consistent with the Steelworkers Trilogy and Storer Broadcasting.

III. PETITIONER'S ANALOGY TO RULE 10 OF THE FEDERAL RULES OF APPELLATE PROCEDURE IS ERRONEOUS.

Petitioner also relies on Rule 10(c) of the Federal Rules of Appellate Procedure, which governs preparation of the record for appeal if no transcript is

available, as being "analogous to what was done in the case at bar." (Petitioner's Brief, at 28). Although Rule 10(c) does allow an Appellant to "prepare a statement of the evidence or evidence from the best means available, including [his] the appellant's recollection," Petitioner has cited no authority that supports application of this Rule to the review of an arbitration award. Moreover, Petitioner did not follow the procedures of Rule 10(c) in the case at bar. The Rule provides that the proposed statement of evidence "shall be served on the Appellee, who may serve objections or proposed amendments thereto within ten (10) days after service. Thereupon the statement and any objections or proposed amendment shall be submitted to the district court for

settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal." Even if Rule 10(c) were applicable to the case at bar, the Petitioner has failed to abide by its dictates.

It is well settled that arbitrators are not bound by formal rules of procedure evidence, and the standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing. National Post Office, 751 F.2d at 841; Graham Service, Inc. v. Teamsters Local 975, 700 F.2d 420, 422 (8th Cir. 1982). To allow the losing party in arbitration to subsequently attack the arbitration award on the basis of affidavits from persons who did not

testify at the arbitration hearing, that when these affidavits add their own opinions on the ultimate issues before the arbitrator, would defeat the entire purpose of arbitration - i.e., to allow the parties to resolve their differences in a speedy, economical manner.

CONCLUSION

It is respectfully submitted that Petitioner has wholly failed to sustain his burden of establishing under Rule 17 that there are "special and important reasons" why the writ should be granted. The unpublished decision below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided a federal question in a way to conflict with applicable decisions of this Court or of another

Court of Appeals on the same matter. The Court of Appeals correctly decided that the decision of the arbitrator may not be judicially impeached by post-arbitration affidavits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing have been served by forst class United States mail pursuant to Supreme Court Rule 28.3 this 22nd day of August, 1986, upon C Michael Robbins, 405 Two Mile Pike, Goodlettsville, TN 37072 and David S. Stocton, P.O. Box 1246, 161 S. Tipton, Munford, TN 38058.